

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 27 November 2024

DOCKET NUMBER: AR20240001532

APPLICANT REQUESTS: in effect, correction of his record to show he was placed on the Temporary Disability Retired List (TDRL) and retired in the highest rank/grade he held while serving on active duty, sergeant (SGT)/E-5.

APPLICANT'S SUPPORTING DOCUMENTS CONSIDERED BY THE BOARD:

- DD Form 149 (Application for Correction of Military Record)
- DA Form 199 (Informal Physical Evaluation Board (PEB) Proceedings) convened on 5 October 2015

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code, Section 1552(b); however, the Army Board for Correction of Military Records (ABCMR) conducted a substantive review of this case and determined it is in the interest of justice to excuse the applicant's failure to timely file.
2. The applicant states his demotion from SGT to specialist (SPC)/E-4 in 2012 was directly related to behavioral problems due to mental health disabilities incurred through combat operations in Iraq. His subsequent demotion to private first class (PFC)/E-3 was also directly related to mental health issues. Both the Army and the Department of Veterans Affairs (VA) awarded him with 100 percent (%) disability status in 2014 upon his medical retirement from active duty. He feels it would be a great benefit to his current mental health struggles to once again proudly display the highest rank he achieved while serving 9 years on active duty, and incurring injuries detrimental to the remainder of his functional living status.
3. The applicant enlisted in the Regular Army on 18 July 2005. He completed training and was awarded military occupational specialty (MOS) 12B (Combat Engineer). He was assigned to a unit in Germany.

4. The applicant served in Iraq from 1 September 2006 to 15 November 2007. Permanent orders show he was awarded the Combat Action Badge for actively engaging or being engaged by the enemy on 19 December 2006.
5. The applicant served in Iraq from 2 December 2008 to 20 November 2009. On 5 June 2009, while in Iraq, he reenlisted for a period of 6 years.
6. A review of his Enlisted Record Brief shows he was promoted to the rank/grade of SGT/E-5 on 1 November 2009.
7. The applicant's DA Form 2166-8 (Noncommissioned Officer Evaluation Report (NCOER)) rendered for the period from 1 November 2009 through 31 October 2010 shows he received unfavorable remarks and ratings regarding his performance and potential from his rating officials. His rater indicated that he failed to uphold the Army Values of Respect and Personal Courage; that he needed improvement in the Values/NCO Responsibilities areas of Competence and Leadership; and his overall potential for promotion and/or service in positions of greater responsibility was marginal. His senior rater rated both his overall performance and potential for promotion and/or service in positions of greater responsibility as fair.
8. The applicant's NCOER rendered for the period from 1 November 2010 through 31 October 2011 shows he received favorable remarks and ratings regarding his performance and potential from his rating officials. His rater indicated that he upheld the Army Values; that he performed successfully in each area of Values/NCO Responsibilities; and rated his overall potential for promotion and/or service in positions of greater responsibility as fully capable. His senior rater rated his overall performance as successful and potential for promotion and/or service in positions of greater responsibility as superior. He had a completely different rating chain from the previous rating period.
9. The applicant's NCOER rendered for the period from 1 November 2011 through 10 March 2012 shows he received both favorable and favorable remarks and ratings regarding his performance and potential from his rating officials. His rater indicated that he upheld the Army Values; that he needed some improvement in the Values/NCO Responsibilities areas of Leadership and Responsibility and Accountability; and rated his overall potential for promotion and/or service in positions of greater responsibility as marginal. His senior rater rated both his overall performance as successful and potential for promotion and/or service in positions of greater responsibility as fair. The applicant had the same rater and reviewer that he had for the previous rating period, but a different senior rater.

10. A Medical Evaluation Board (MEB) Behavioral Health Addendum rendered on 25 September 2012, shows the applicant was referred to a MEB for Mood Disorder Not Otherwise Specified (NOS). Other diagnoses noted in his medical record included post-traumatic stress disorder (PTSD), Adjustment Disorder with anxiety and depressed mood, Nightmare Disorder, and Alcohol Dependence. It was determined the applicant's condition of Mood Disorder NOS failed to meet retention standards prescribed in Army Regulation 40-501 (Standards of Medical Fitness) and warranted referral to a PEB. It was further determined that the applicant was mentally competent for pay purposes, capable of understanding the nature of, and cooperating in PEB proceedings, and posed no danger to himself or others.

11. A DA Form 2627 (Record of Proceedings under Article 15, Uniform Code of Military Justice (UCMJ)) shows the applicant accepted nonjudicial punishment under the provisions of Article 15, of the UCMJ on 16 October 2012 for failing to go at the time prescribed to his appointed place of duty on at least two occasions. There appears to have been additional offenses listed on a continuation sheet; however, it is not filed in the available record. His punishment included: reduction from E-5 to SPC/E-4; forfeiture of \$1,181.00 pay per month for 2 months, suspended, to be automatically remitted if not vacated before 16 April 2013; extra duty for 45 days; and restriction for 45 days. The applicant appealed the punishment and relief was granted to suspend the restriction, to be automatically remitted if not vacated before 16 April 2013.

12. The applicant's NCOER rendered for the period from 11 March 2012 through 5 November 2012 shows he was relieved for cause. He received unfavorable remarks and ratings regarding his performance and potential from his rating officials. His rater indicated that he failed to uphold the Army Values of Loyalty, Duty, Respect, Honor, and Integrity; that he needed improvement in every area of the Values/NCO Responsibilities; and his overall potential for promotion and/or service in positions of greater responsibility was marginal. His senior rater rated both his overall performance and potential for promotion and/or service in positions of greater responsibility as poor. He had a completely different rating chain from the previous rating period.

13. A DA Form 7652 (Physical Disability Evaluation System (PDES) Commander's Performance and Functional Statement), dated 18 November 2012, shows the applicant's immediate commander provided a synopsis of his service performance.

a. The commander noted the applicant:

(1) was a combat Veteran following two deployments in support of Operation Iraqi Freedom;

(2) had previously held the rank/grade of SGT/E-5 prior to being demoted for going absent without leave (AWOL), threatening a commissioned officer, and multiple incidents of failing to report.

(3) did not perform duties in his MOS;

(4) was not a good fit for military service because his PTSD caused him to be very hostile at work; and

(5) had threatened violence in the workplace.

b. The commander highly recommended him for administrative separation due to misconduct.

14. An MEB Narrative Summary rendered on 11 December 2012 shows the applicant was medically evaluated for 16 conditions for which he had been diagnosed. It was determined the applicant's condition of Mood Disorder NOS failed to meet retention standards prescribed in Army Regulation 40-501 (Standards of Medical Fitness) and warranted referral to a PEB.

15. The specific facts and circumstances regarding the initiation of administrative separation action against the applicant are not present in his available record. However, Headquarters, 7th Infantry Division, Joint Base Lewis-McChord, WA, memorandum, Subject: Separation Under Army Regulation 635-200 (Active Duty Enlisted Administrative Separations), Chapter 14-12b, Patterns of Misconduct, dated 8 October 2013, shows the Commanding General (CG) reviewed the administrative separation board proceedings and the MEB proceedings pertaining to the applicant. The CG determined the applicant's medical condition was not a direct or substantial contributing cause of the conduct that led to the recommendation for administrative separation. The CG found no other circumstances in this case that would warrant disability processing instead of further processing for administrative separation. The CG directed the applicant be discharged from the Army under the provisions of Army Regulation 635-200, Chapter 14, Patterns of Misconduct. This discharge was suspended for 12 months to allow the applicant to separate through the Integrated Disability Evaluation System (IDES) process. The CG directed the applicant be issued a under honorable conditions (general) discharge certificate.

16. An Addendum to MEB Narrative Summary rendered on 12 November 2013 shows the applicant's diagnosis of Mood Disorder NOS was diagnosed by the VA as PTSD, Bipolar II Disorder by a VA Psychological Compensation and Pension Examination

performed on 30 October 2012. The applicant was determined to fail Army retention standards by his Behavioral Health provider, who had seen him 23 times, since he initiated treatment on 21 December 2011, in accordance with the provisions of Army Regulation 40-501. It was recommended that the applicant's case be referred to the PEB for final adjudication.

17. A DA Form 2627 shows the applicant accepted nonjudicial punishment under the provisions of Article 15, of the UCMJ on 23 January 2014 for failing to go at the time prescribed to his appointed place of duty. His punishment included: reduction to E-3; extra duty for 14 days; and an oral reprimand. The applicant appealed the punishment and relief was granted by removing the extra duty from his punishment.

18. A DA Form 199 shows a PEB convened on 10 March 2014 to evaluate the applicant's case. The PEB found the applicant was unfit and recommended a disability rating of 100% and that be placed on the TDRL with a reexamination during December 2014. The applicant concurred with the findings and recommendations of the PEB and did not request reconsideration of his VA ratings on the same date.

19. Orders 097-0010 issued by Department of the Army, Directorate of Human Resources, Military Personnel Division, Transition Center, Fort Lewis-McChord, WA on 7 April 2014, directed his release from active duty by reason of temporary physical disability, in the rank/grade of PFC/E-3, effective 17 June 2014. These orders further directed his placement on the TDRL, in the same rank/grade, effective 18 June 2014. His percentage of disability was 100%.

20. On 24 April 2014, the applicant requested the Army Grade Determination Review Board (AGDRB) review his case to consider retiring him in his highest rank/grade held, SGT/E-5. He stated he was reduced under the provisions of Article 15, of the UCMJ, but believed he should be retired as a SGT/E-5 because it was the rank/grade he held longer than any other during his time in the military.

21. On 18 May 2014, the AGDRB convened on behalf of the Secretary of the Army under the provisions of Army Regulation 15-80 (AGDRB and Grade Determinations) to consider the applicant's case. After a thorough review of his Army Military Human Resource Record and PEB Proceedings (which included an Article 15 while in the grade of E-5, dated 16 October 2012, and a subsequent Article 15, dated 23 January 2014), the AGDRB determined the highest rank in which he served satisfactorily for the purpose of computation of disability retirement/separation pay was his grade on the date of separation, PFC/E-3.

22. On 17 June 2014, the applicant was honorably retired in the rank/grade of PFC/E-3 with and effective date of pay grade of 23 January 2014. His narrative reason for separation was Disability, Temporary (Enhanced). He had time lost due to AWOL from 2 July 2012 to 17 July 2012.

23. A DA Form 199 shows a PEB convened on 15 October 2015 to evaluate the applicant's case. The PEB found the applicant was unfit and recommended a disability rating of 100% and that his disposition be permanent disability retirement. The applicant was afforded an opportunity to concur with or dispute the findings and recommendations of the PEB but did not provide a response. In the absence of a response, his PEB was processed as if he had concurred with the PEB's findings and recommendations.

24. On 5 November 2015, the U.S. Army Physical Disability Agency, Arlington, VA notified the applicant of his removal from the TDRL. Since he was being permanently retired, he was advised to obtain from the nearest Army, or other Department of Defense installation, an application form for a new identification and privilege card for himself and eligible family members.

25. Order D309-66, issued by the U.S. Physical Disability Agency, Arlington, VA on 5 November 2015 show the applicant was removed from the TDRL on 5 November 2015 because of permanent disability in the rank/grade of PFC/E-3 and permanently retired.

26. By regulation, a Soldier being retired for physical disability is entitled to be retired in a grade equivalent to the highest grade in which he or she served satisfactorily.

27. In reaching its determination, the Board can consider the applicant's petition, arguments and assertions, and service record in accordance with the published equity, injustice, or clemency guidance.

28. MEDICAL REVIEW:

a. Background: The applicant is applying to the ABCMR requesting consideration correction of his record to show he was placed on the Temporary Disability Retired List (TDRL) and retired in the highest rank/grade he held while serving on active duty, sergeant (SGT)/E-5.

b. The specific facts and circumstances of the case can be found in the ABCMR Record of Proceedings (ROP). Pertinent to this advisory are the following:

- The applicant enlisted into the Regular Army on 18 July 2005. He deployed to Iraq from 1 September 2006 to 15 November 2007 and again from 2 December 2008 to 20 November 2009.
- The applicant accepted NJP on 16 October 2012 for failing to go at the time prescribed to his appointed place of duty on two occasions. There appears to have been additional offenses listed on a continuation sheet; however, it is not filed in the available record.
- A DA Form 7652 (Physical Disability Evaluation System (PDES) Commander's Performance and Functional Statement), dated 18 November 2012, shows the applicant's immediate commander provided a synopsis of his service performance, which included notation that the applicant previously held the rank of E-5 prior to being demoted for going AWOL, threatening a commissioned officer, and multiple incidents of failing to report. It was also noted that he did not perform duties in his MOS and had threatened violence in the workplace.
- An MEB Narrative Summary dated 11 December 2012 showed the applicant was medically evaluated for 16 conditions for which he had been diagnosed. It was determined the applicant's condition of Mood Disorder NOS failed to meet retention standards prescribed in Army Regulation 40-501 and warranted referral to a PEB.
- The specific facts and circumstances regarding the initiation of administrative separation action against the applicant are not present in his available record. However, a memorandum with the subject "Separation Under Army Regulation 635-200, Chapter 14-12b, Patterns of Misconduct" dated 8 October 2013, showed the Commanding General (CG) reviewed the administrative separation board proceedings and the MEB proceedings and determined the applicant's medical condition was not a direct or substantial contributing cause of the conduct that led to the recommendation for administrative separation. The CG directed the applicant be discharged from the Army, but the discharge was suspended for 12 months to allow the applicant to separate through the Integrated Disability Evaluation System (IDES) process.
- PEB convened on 10 March 2014 and found the applicant was unfit and recommended a disability rating of 100% and that he be placed on the TDRL with a reexamination during December 2014.
- The applicant accepted NJP on 23 January 2014 for failing to go at the time prescribed to his appointed place of duty.
- On 18 May 2014, the AGDRB convened, and after a thorough review of his Army Military Human Resource Record and PEB Proceedings, the AGDRB determined the highest rank in which he served satisfactorily for the purpose of computation of disability retirement/separation pay was his grade on the date of separation, PFC/E-3.

- The applicant was discharged on 17 June 2014, and on 5 November 2015 the U.S. Army Physical Disability Agency notified the applicant of his removal from the TDRL since he was being permanently retired.

c. Review of Available Records: The Army Review Board Agency (ARBA) Behavioral Health Advisor reviewed the supporting documents contained in the applicant's file. The applicant asserts his demotions were directly related to behavioral problems associated with his mental health condition, and he indicated PTSD and other mental health as mitigating factors on his application. Results of an Informal PEB proceeding dated 5 October 2015 showed that the applicant was diagnosed with PTSD and permanent disability retirement was recommended. An MEB narrative summary dated 11 December 2012 and addendum dated 25 September 2012 showed diagnoses of PTSD, Bipolar Disorder, Alcohol Abuse in remission and secondary to PTSD and Bipolar Disorder, and the summary indicates the necessity of several medications, including mood stabilizers and an antidepressant. The addendum provides a comprehensive review of symptoms, diagnoses, and treatment as well as rationale for duty limitations and the applicant's unfitting condition. Notably, the author discusses concerns related to secondary gain, inconsistent reporting of symptoms and attendance to appointments, and invalidated psychological testing. There was sufficient evidence that the applicant was diagnosed with a psychiatric condition while on active service.

d. The Joint Legacy Viewer (JLV), which includes medical and mental health records from DoD and VA, was also reviewed and showed the applicant initiated mental health treatment while deployed to Iraq in May 2007, and he reported symptoms of depression and recent discovery of his wife's affair resulting in a pregnancy. He reported a history of treatment for depression in March 2006 with medication and current and historical suicidal thoughts and gestures (i.e. cutting). He was diagnosed with Depression and started on a medication, and counseling was recommended although there is no documentation available of any psychotherapy. He was next seen in November 2007 for a redeployment assessment, and his primary concern noted was marital problems. He engaged in counseling regularly through April 2008 and was diagnosed with Adjustment Disorder associated with relationship problems and alcohol use. Documentation from November 2009 showed that the applicant denied any significant combat exposure during his second deployment, and he reported stable relationships but drinking 6-7 beers daily. He was next seen in August 2010 following an incident where he "blew up" at his squad leader secondary to several psychosocial and family stressors. His diagnosis remained Adjustment Disorder, and he engaged in mental health treatment through November 2011 with the primary focus of treatment being relationship problems. A comprehensive summary of the applicant's care can be reviewed via the MEB narrative summary included in his application. The applicant is 100% service connected through the VA for PTSD, and he initially engaged mental health treatment through VA in April 2015. His diagnoses were PTSD, Bipolar Disorder, Obsessive Compulsive Disorder, and Cannabis Use Disorder, and he has intermittently utilized VA

for mental health services. He currently has prescriptions for a mood stabilizer, two antidepressants, a medication for nightmares, and an antipsychotic (used for sleep).

e. Based on the available information, it is the opinion of the Agency Behavioral Health Advisor that there is insufficient evidence to support a change in grade for the purpose of retirement. The applicant's pattern of misconduct, including AWOL, not being at his appointed place of duty at the prescribed time, and failing to report for duty are behaviors that can be natural sequelae to mental health conditions such as PTSD. However, threatening violence in the workplace and threatening a commissioned officer are not part of the natural history or sequelae of trauma exposure, and PTSD does not affect one's ability to distinguish right from wrong and act in accordance with the right. This BH Advisor concurs with the Army Grade Determination Review Board's decision.

f. Kurta Questions:

(1) Did the applicant have a condition or experience that may excuse or mitigate the discharge? NA; request for higher grade following medical retirement

(2) Did the condition exist or experience occur during military service? NA; request for higher grade following medical retirement

(3) Does the condition or experience actually excuse or mitigate the discharge? NA; request for higher grade following medical retirement

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The Board carefully considered the applicant's record of service, documents submitted in support of the request and executed a comprehensive and standard review based on law, policy and regulation. Upon review of the applicant's petition, available military records and medical review, the Board concurred with the advising official finding insufficient evidence to support a change in grade for the purpose of retirement. The opine noted the applicant's pattern of misconduct, including AWOL, not being at his appointed place of duty at the prescribed time, and failing to report for duty are behaviors that can be natural sequelae to mental health conditions such as PTSD.

2. The Board determined there is insufficient evidence of in-service mitigating factors to overcome the misconduct of AWOL and threatening violence in the workplace and threatening a commissioned officer. The Board agreed that PTSD does not affect's the applicant's ability to distinguish right from wrong. Furthermore, the Board found no error

or injustice in the Army Grade Determination Board decision, finding the last rank the applicant held satisfactory was PFC/E-3. Based on the preponderance of evidence and the advising opine, the Board found the applicant's contentions for correction of his record to show he was placed on the Temporary Disability Retired List (TDRL) and retired in the highest rank/grade he held while serving on active duty, sergeant (SGT)/E-5 is without merit. Therefore, the Board denied relief.

BOARD VOTE:

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:	:	:	GRANT FULL RELIEF
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■	■	■	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The evidence presented does not demonstrate the existence of a probable error or injustice. Therefore, the Board determined the overall merits of this case are insufficient as a basis for correction of the records of the individual concerned.

I certify that herein is recorded the true and complete record of the proceedings of the Army Board for Correction of Military Records in this case.

REFERENCES:

1. Title 10, U.S. Code, Section 1552(b), provides that applications for correction of military records must be filed within 3 years after discovery of the alleged error or

injustice. This provision of law also allows the ABCMR to excuse an applicant's failure to timely file within the 3-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.

2. Title 10, U.S. Code, Section 1556, provides the Secretary of the Army shall ensure that an applicant seeking corrective action by ARBA is provided a copy of all correspondence and communications, including summaries of verbal communications, with any agencies or persons external to agency or board, or a member of the staff of the agency or Board, that directly pertains to or has material effect on the applicant's case, except as authorized by statute.

3. Army Regulation 15-185 (ABCMR) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The regulation prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The regulation provides that the ABCMR begins its consideration of each case with the presumption of administrative regularity. The applicant has the burden of proving an error or injustice by a preponderance of the evidence. It is not an investigative body.

4. Army Regulation 15-80 (AGDRB and Grade Determinations) establishes policies, procedures, and responsibilities of the AGDRB. Most grade determinations do not require action by the AGDRB, or the exercise of discretion by other authorities, because they are automatic grade determinations that result from the operation of law and this regulation.

a. A grade determination is an administrative decision to determine appropriate retirement grade, retirement pay, or other separation pay. Although a lower grade determination may affect an individual adversely, it is not punitive.

b. Paragraph 2-5 outlines grade determination considerations. It states that service in a higher grade will normally be considered unsatisfactory if reversion to a lower grade was expressly for prejudice or cause; owing to misconduct; caused by NJP pursuant to Article 15 of the UCMJ; or the result of the sentence of a court-martial. It also states that service will be considered unsatisfactory if there is sufficient unfavorable information to establish that the Soldier's service in the grade in question was unsatisfactory.

5. Title 10, U.S. Code, Section 1372 provides the legal authority for grades to be awarded to members retiring for physical disability. It states, in pertinent part, that any member of an armed force who is retired for physical disability is entitled to a grade equivalent to the highest of the following: the grade in which he is serving on the date when his name is placed on the Retired List; the highest grade in which he served

satisfactorily; or the grade to which he would have been promoted had it not been for the physical disability that resulted in retirement.

6. On 25 August 2017, the Office of the Undersecretary of Defense for Personnel and Readiness issued clarifying guidance for the Secretary of Defense Directive to Service Discharge Review Boards (DRB) and Service Boards for Correction of Military/Naval Records (BCM/NR) when considering requests by Veterans for modification of their discharges due in whole or in part to: mental health conditions, including PTSD; Traumatic Brain Injury; sexual assault; or sexual harassment. Boards are to give liberal consideration to Veterans petitioning for discharge relief when the application for relief is based in whole or in part to those conditions or experiences. The guidance further describes evidence sources and criteria and requires Boards to consider the conditions or experiences presented in evidence as potential mitigation for misconduct that led to the discharge.

7. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military DRBs and BCM/NRs regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. BCM/NRs may grant clemency regardless of the type of court-martial. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to other corrections, including changes in a discharge, which may be warranted based on equity or relief from injustice.

a. This guidance does not mandate relief, but rather provides standards and principles to guide Boards in application of their equitable relief authority. In determining whether to grant relief on the basis of equity, injustice, or clemency grounds, BCM/NRs shall consider the prospect for rehabilitation, external evidence, sworn testimony, policy changes, relative severity of misconduct, mental and behavioral health conditions, official governmental acknowledgement that a relevant error or injustice was committed, and uniformity of punishment.

b. Changes to the narrative reason for discharge and/or an upgraded character of service granted solely on equity, injustice, or clemency grounds normally should not result in separation pay, retroactive promotions, and payment of past medical expenses or similar benefits that might have been received if the original discharge had been for the revised reason or had the upgraded service characterization.

//NOTHING FOLLOWS//